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CENTRAL FAX CENTER****NOV 21 2006**Application No. 10/675,820
Amendment dated November 21, 2006
Reply to Office Action of June 5, 2006**REMARKS**

Applicant amended claim 1 to further define Applicant's invention.

In the Office Action, the Examiner rejected claims 1-28 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,545,374 to Jacobson ("Jacobson"). The Examiner referred to a spinal device comprising a body 10, wherein the device has a pivotal relationship between the two portions. The Examiner compared the device 10 in Figs. 4 and 5 and also referred to an element capable of pivoting in Fig. 8. The Examiner states that "the first and second portions are also at least partially arcuate (see Figs. 12 and 13)." The Examiner also states that the "two portions are also adapted to allow for a surgical instrument to pass through, and that are also at least partially arcuate (see Fig. 8)."

Applicant submits that the Examiner is improperly using a number of different instruments disclosed in Jacobson to reject the Applicant's claimed guard. The spinal device comprising a body 10 is "a specially designed speculum." (Jacobson, column 5, line 49.) "Once the speculum is properly positioned, the surgeon spreads its jaw thereby creating a channel for cannula insertion." (Jacobson, column 5, lines 60-62.) As shown in Figs. 5 and 6, the cannula 11 is introduced into the channel and the speculum is removed. (Jacobson, column 6, lines 3-5.) The Examiner referred to an element capable of pivoting in Fig. 8 that is a rongeur forceps 18, such as those shown in Figs. 17-19. The rongeur forceps 18 is "inserted down the cannula 11 into the disc to scoop out the fragmented nucleus material." (Jacobson, column 7, lines 40-43.) The Examiner also referred to cannula 30 shown in Figs. 12 and 13. (Jacobson, column 9, lines 17-23) Applicant submits that the Examiner's reference to various aspects of speculum 10, then to rongeur forceps 18 within cannula 11, and then to cannula 30 in Jacobson, whether referring to any one of these instruments individually or in any proper combination, does not teach or suggest a guard as recited in independent claim 1.

The Examiner rejected claims 1-19 and 27 under 35 U.S.C. § 102(e) as being anticipated by U.S. Publication No. 2003/0135220 to Cauthen ("Cauthen"). Independent claim 1, as now amended, recites "said first and second portion being pivotal about an axis that passes through at least a portion of the pathway."

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Cauthen teaches an insertion instrument 10 having a pair of guides 16, 20 that pivot about articulating hinge 22. (Cauthen, page 2, paragraphs 33-34; Figs. 1-2). Guides 16, 20 pivot about an axis that lies outside the pathway leading to the disc space and adjacent vertebral bodies. (See, e.g., Cauthen, Figs. 1-2). Cauthen does not teach or suggest a guard as recited in independent claim 1.

The Examiner rejected claim 30 under 35 U.S.C. § 103(a) as being unpatentable over Cauthen in view of U.S. Publication No. 2003/0229401 to Mansourt et al. ("Mansourt"). Applicant submits that the rejection over claim 30 is rendered moot at least because it depends from an allowable independent claim, or claims dependent therefrom.

Applicant submits that independent claim 1 is patentable and that dependent claims 2-30 dependent from independent claim 1, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.

In view of the foregoing remarks, it is respectfully submitted that the claims, as amended, are patentable. Therefore, it is requested that the Examiner reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

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Dated: November 21, 2006

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